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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

DON KING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) When a criminal defendant, here a boxing promoter, exercises the right to seek a mistrial over the objection of the prosecution, and the prosecution thereafter files a superseding indictment based upon the same set of facts against the defendant and adds as a defendant the promoter's wholly owned company, which effectively enhances in multiple respects the punishment faced by the promoter, does the doctrine of prosecutorial vindictiveness require dismissal of the superseding indictment as to the new defendant.

(2) In a case in which a superseding indictment adds the defendant's wholly owned corporation as a defendant after a mistrial, is the presumption of prosecutorial vindictiveness rebutted where the prosecution's only "legitimate and articulable" reason is one of "strategy" designed to "increase its chances for a conviction."

RULE 29.1 LISTING

Don King Productions, Inc., is a privately-held corporation which has no parent companies, subsidiaries or affiliates that have issued shares to the public.

RULE 14.1(b) LISTING OF THE PARTIES

Petitioner is Don King. Don King and Don King Productions, Inc., were appellees below. Respondent is the United States of America, appellant below.

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Don King respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit that gives rise to this petition is published at 126 F.3d 394 (2d Cir. 1997). It is reprinted in the Appendix hereto. The opinion of the United States

District Court for the Southern District of New York is unreported. It is reprinted in the Appendix hereto.

JURISDICTION

The United States Court of Appeals for the Second Circuit entered judgment on October 1, 1997. A petition for rehearing *en banc* was denied on November 18, 1997. The Court of Appeals had jurisdiction to hear the interlocutory appeal from the District Court under 18 U.S.C. § 3731. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

A. Introduction and Summary

Criminal defendants who exercise important procedural rights are protected from retribution by the doctrine of prosecutorial vindictiveness. Prosecutors are not permitted to seek revenge against a defendant who chooses to exercise a right the prosecutor finds repugnant. This case presents a vitally important issue with widespread application to defendants and the bar that represents them. The United States Court of Appeals for the Second Circuit held that the presumption of vindictiveness that arose when the government enhanced the charges against Don King by adding Mr. King's

wholly owned corporation, Don King Productions, Inc., as a defendant, after Mr. King sought and was granted a mistrial over unprecedented government objection, can be rebutted on the flimsiest of justifications: the government's desire for a conviction of some sort.

This Court has never addressed the issue of prosecutorial vindictiveness in the context of a contested mistrial. There now is a conflict in the circuits on this question that must be clarified in order to ensure that defendants will be able to exercise their procedural rights free of fear that the government will retaliate by "upping the ante" against them.

B. Factual Background

Don King is a fight promoter. Mr. King is the one hundred percent (100%) owner of Don King Productions, Inc. ("DKP"), a corporation with more than forty (40) employees which promotes professional prizefights. DKP is the licensee in the various states in which its promotions occur.

In 1991, Mr. King arranged a prizefight between Julio Cesar Chavez and Harold Brazier. DKP, as was its practice, obtained insurance from Lloyd's of London ("Lloyd's") in the event the fight was canceled. The insurance for the Chavez/Brazier fight was in the amount of seven hundred fifty thousand dollars ($750,000.00) and covered "training expenses and advances" DKP paid to the fighters. As it turned out, Mr. Chavez was injured while training and the fight had to be canceled. As a result of the cancellation, DKP submitted a claim to Lloyd's.

DKP's claim totaled in excess of six hundred

seventy thousand dollars ($670,000.00), three hundred fifty thousand ($350,000.00) of which related to payments to Mr. Chavez. Two hundred seventy thousand dollars ($270,000.00) of that money was supported by a seven hundred thirty-six thousand dollar ($736,000.00) check to Mr. Chavez that represented an advance against the Brazier purse and was owed by Mr. Chavez. The remaining eighty thousand dollars ($80,000.00) was supported by a check and wire transfer advice representing payments to Mr. Chavez for training expenses. DKP submitted to Lloyd's a contract between DKP and Mr. Chavez that stated that Mr. Chavez had been paid three hundred fifty thousand dollars ($350,000.00) for "maintenance non-refundable training expenses."

In 1994, after two years of grand jury investigation based on the immunized cooperation of a disgruntled former employee who threatened "to get King," an indictment was returned which named Mr. King as the only defendant in connection with the Lloyd's insurance claim. The indictment alleged that Mr. King violated the wire fraud statute, 18 U.S.C., § 1343, by falsely representing or causing others to falsely represent that the three hundred fifty thousand dollars ($350,000.00) had been paid to Mr. Chavez as "non-refundable training expenses."

Although DKP employees were interviewed prior to the original indictment, and in fact, were given prosecutorial immunity, the government chose not to indict the corporation even though the purported evidence of Mr. King's guilt would have been sufficient to establish corporate guilt under established principles of derivative corporate liability. Rather, the government deliberately chose to focus its considerable power and resources solely

upon prosecuting Mr. King.

On October 10, 1995, the onslaught began. The government presented nineteen (19) witnesses and introduced over three hundred (300) documents over a period of weeks. Ultimately, on November 16, 1995, the jury informed the court that it was irretrievably deadlocked, and Mr. King exercised his right to seek a mistrial. The government vehemently opposed the request for a mistrial.

In addition to the jury's inability to reach a decision, there was a concern that one of the jurors would have to leave for a prearranged overseas trip. The government urged the District Court to give an Allen charge and to proceed with an eleven (11) person jury in the absence of this juror. The government, after weeks of trial, did not relish losing the opportunity to convict Mr. King. The trial court declined to give an Allen charge and granted the mistrial motion.

The government's response to the Court's ruling was swift and sure. The government requested that the District Court stay its Order to allow it to seek a writ of mandamus from the Second Circuit. A temporary stay in place, the prosecutors, together with other senior members of the U.S. Attorney's Office, sought immediate review of the District Court's Order by Circuit Judge J. Daniel Mahoney who refused to act alone. The District Court complied when it was asked by Judge Mahoney to stay its Order discharging the jury until a three-judge panel of the Court of Appeals could hear the request for a writ of mandamus the following morning.

After working well into the night, the government

eventually abandoned its effort to obtain a writ of mandamus because it could not meet the requisite legal standard. In a letter sent to the defense by facsimile late that night, the government conceded that it had no legal basis to pursue mandamus. In no uncertain terms, however, the government loudly complained that it believed that the District Court abused its discretion in granting the mistrial. The government's opposition to the mistrial was vehement.

The following morning, the District Court implemented its ruling of the previous day and discharged the jury. Immediately thereafter, the U.S. Attorney called a press conference announcing her intention to retry Mr. King.

True to its word, the government filed a superseding indictment on March 24, 1997. The allegations were unchanged. The indictment differed in only one respect: It added DKP as a defendant.

C. The Proceedings Below

Mr. King moved to dismiss the superseding indictment on the basis of prosecutorial vindictiveness. The District Court granted the motion, and the government appealed to the United States Court of Appeals for the Second Circuit. The Court of Appeals reversed the District Court's dismissal of the superseding indictment. Mr. King filed a motion for rehearing *en banc* which was denied.

In dismissing the superseding indictment, the District Court held that Mr. King was faced with enhanced charges because of substantially increased fines and the potential

loss of his corporation's licenses to promote boxing events in various states. Appendix B at 33a. The District Court agreed with the defense that the presumption of vindictiveness arose in these circumstances and the government failed to rebut it. Id.

The Court of Appeals for the Second Circuit disagreed. Appendix A at 2a. In a disturbingly sparse decision, the Court of Appeals skirted the issues critical to an understanding of prosecutorial vindictiveness. Rather, the Court of Appeals began the analysis by assuming that the presumption of vindictiveness had been established and looked only to whether the government had successfully rebutted the presumption.

The Court of Appeals held that a change in the government's "strategy" was sufficient to rebut the presumption of vindictiveness. It held that "the events at King's first trial reasonably convinced the prosecutors that an indictment of King's corporation would improve their chances of getting the jury to convict at least one of the defendants." Appendix A at 12a. In other words, according to the Court of Appeals, it was a legitimate "objective" reason for a superseding indictment with enhanced penalties and collateral consequences directed against Mr. King and his wholly owned corporation that the government wanted a conviction. The desire for a conviction is the underlying motive in all prosecutions, and cannot be endorsed as a legitimate "objective" reason arising after the defendant's exercise of an important right to allow a superseding indictment that significantly "ups the ante" for the defendant.

REASONS FOR GRANTING THE PETITION

It is well-established law that criminal defendants should not be chilled from exercising important due process rights during a trial because of fear of subsequent prosecutorial retribution. See United States v. DeMarco, 550 F.2d 1224, 1227 (9th Cir. 1977), cert. denied, 434 U.S. 827 (1977) ("The prophylactic rule is designed not only to relieve the defendant who has asserted his right from bearing the burden from 'upping the ante' but also to prevent chilling the exercise of such rights by other defendants who must make their choices under similar circumstances in the future."); United States v. Ruesga-Martinez, 534 F.2d 1367, 1369 (9th Cir. 1976)(The doctrine "seek[s] to reduce or eliminate apprehension on the part of an accused that he may be subjected to retaliatory or vindictive punishment by the prosecution only for attempting to exercise his procedural rights.").

Further, defense counsel need clear guidance on important constitutional doctrines that safeguard criminal defendants' due process rights in order to competently advise them. The doctrine of prosecutorial vindictiveness prohibits the government from retaliating by seeking enhanced penalties against defendants who seek to exercise important procedural rights. The right to seek a mistrial in the face of a jury deadlock is a valued procedural right. Its exercise cannot be chilled by the apprehension of enhanced charges should a mistrial be ordered over the government's objection. Any other conclusion would, in a very real sense, infringe upon counsel's obligation to provide that effective and adequate representation that is guaranteed by the Sixth Amendment. The Court of Appeals, here, eviscerated the doctrine by holding that a change in prosecutorial "strategy," grounded in its desire

for a conviction, is a sufficient reason to rebut the presumption of vindictiveness. The decision in this case is in conflict with the view of the Ninth Circuit, which rejected a change in prosecutorial "strategy" specifically designed to increase the likelihood of conviction after a hung jury mistrial when there was enhancement. United States v. Motley, 655 F.2d 186 (9th Cir. 1982). For these reasons, the Supreme Court should grant this petition for a writ of certiorari to clarify this important due process protection.

I. THE DOCTRINE OF PROSECUTORIAL VINDICTIVENESS IS AN IMPORTANT CONSTITUTIONAL SAFEGUARD THAT HAS BEEN DILUTED BY THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND THE DOCTRINE MUST BE INTERPRETED AS REQUIRING THE DISMISSAL OF A SUPERSEDING INDICTMENT PRESENTING ENHANCED PENALTIES FOR THE SAME BASIC CONDUCT WHICH IS BROUGHT AFTER A DEFENDANT EXERCISES THE RIGHT TO SEEK A MISTRIAL OVER THE OBJECTION OF THE GOVERNMENT

It is indisputable that the decision to prosecute violates due process when the prosecution is brought in retaliation for the defendant's exercise of his legal rights. Blackledge v. Perry, 417 U.S. 21, 27 (1974); United States v. Khan, 787 F.2d 28, 31 (2d Cir. 1986). The fear of vindictiveness for exercising a right is as dangerous as actual vindictiveness in potentially deterring the defendant's free and unfettered strategy decisions in a criminal proceeding. North Carolina v. Pearce, 395 U.S.

711, 723-24 (1969). The rights the doctrine of prosecutorial vindictiveness portends to protect are of constitutional magnitude. Courts have repeatedly asserted that "punishing a person for exercising his legal rights violates the Due Process Clause." Lane v. Lord, 815 F.2d 876, 878 (2d Cir. 1987).

Furthermore, since the Supreme Court's decision in Pearce, which involved the imposition by a judge of a harsher sentence after a first conviction had been reversed on appeal, the law has required the dismissal of new charges where it can be said that such charges expose a defendant to additional risk and punishment after the defendant has exercised a procedural right. Due process considerations buttress this requirement. Id.

The question to be determined is whether the practices employed by the prosecutors "pose a realistic likelihood of vindictiveness" so that the defendant is afraid of the punishment that might follow should he chose to exercise his rights. See Blackledge v. Perry, 417 U.S. 21, 27 (1974). The danger realized by Mr. King was that upon exercising his right to seek a mistrial, the government would issue a superseding indictment against his corporation, thereby "upping the ante" against Mr. King personally. This is because DKP is the licensee in various states where Mr. King promotes fights. Thus even if Mr. King is found not guilty, a conviction of DKP could put Mr. King out of business. The new indictment, therefore, clearly put Mr. King at greater risk due not only to the higher level of fines that can be imposed on his corporation (which would be to his individual detriment as the 100 percent stockholder), but also by reason of collateral consequences -- including potential loss of licenses -- flowing from a DKP conviction that would

punish Mr. King even if he personally were acquitted. See Blackledge v. Perry, 417 U.S. 21, 28 n.6 (1974)(both direct and collateral consequences are relevant considerations). Mr. King's constitutional guarantee is to exercise his rights without the apprehension of facing increased penalties due to the prosecutorial upping of the ante.

A. Actual Vindictiveness is Not Required

Bad faith or malicious conduct is not a requirement in vindictive prosecution cases. In Blackledge v. Perry, 417 U.S. 21, 28 (1974), the Supreme Court held, in a case involving enhanced charges filed by the prosecutor after the defendant exercised his right to seek a trial de novo, that:

> There is, of course, no evidence that the prosecutor in this case acted in bad faith or maliciously in seeking a felony indictment against Perry. The rationale of our judgment in the Pearce case, however, was not grounded upon the proposition that actual retaliatory motivation must inevitably exist. Rather, we emphasized that "since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be free of apprehension of such retaliatory motivation on the part of the sentencing judge." 395 U.S. at 725. We think it clear that the same considerations apply here. A person convicted of an offense is entitled to pursue his statutory right to a trial de novo, without apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly

increased potential period of incarceration.

Here the government claimed that it was not seeking retribution for Mr. King's exercise of his rights to seek a mistrial. The government proclaimed that "at no time was the fact that Don King had moved for a mistrial at the initial trial even so much as mentioned during the course of the intra-office discussions or in the discussions with counsel as a reason for adding the corporation as a defendant." Brief for the United States of America, Docket No. 97-1495, United States Court of Appeals for the Second Circuit, at 11. Further, the Court of Appeals determined that the prosecution was motivated simply by a desire to obtain a conviction of some sort.

The government's excuse for bringing the superseding indictment is nothing more than a smokescreen hiding its true motivation. Having failed to convict Mr. King as originally desired, the government decided to indict DKP both to up the ante on Mr. King personally and to seek the chance of a jury compromise, a chance it did not want to risk in 1994.

The Assistant United States Attorney Mr. Weiss swore in his affidavit submitted below that:

> Although we clearly continued to be of the view that the evidence showed that King himself was guilty, we reasoned that a new jury, or some members of it, could believe Mr. King's testimony and the defense that there had been a scheme perpetrated by others at the corporation without Mr. King's knowledge. If a jury were to reach that conclusion, it could reach a verdict justified by the evidence against the corporation but for Mr. King. A jury could ground a split verdict in the

evidence. It was primarily to meet this possibility that the Office decided to seek a superseding indictment.

The government did not want to give the jury the opportunity to reach a split verdict in the first trial. Having failed to obtain a verdict, the government decided to try for any conviction and the corporation was added as a co-defendant. This motive is improper.

B. Vindictiveness is Presumed if the Superseding Indictment Contains Penalty Enhancements

In United States v. Goodwin, 457 U.S. 368, 381 (1982), the Supreme Court reasoned that a change in the charging document made with the benefit of hindsight after the lessons were learned in a trial was suspect because it was more likely to have been motivated by vindictiveness than any pretrial decisions.

In United States v. Motley, 655 F.2d 186 (9th Cir. 1981), the trial court dismissed enhanced charges filed after a hung jury mistrial had been declared over the government's objection. In affirming, the Ninth Circuit held:

> The "appearance of vindictiveness" rule is a prophylactic rule designed both to protect the present defendant from vindictiveness and to prevent a chilling of the exercise of rights by other defendants in the future. United States v. DeMarco, 550 F.2d 1224, 1227 (9th Cir.), cert. denied, 434 U.S. 827, 98 S.Ct. 105, 54 L.Ed.2d 85 (1977). We find that the indictment in this case which contains an enhancement provision that will take effect only if later activated by the prosecution, will raise the same dangers

> of vindictiveness and a chilling effect on future defendants as does an indictment that is more severe on its face. In either case, the appearance of vindictiveness is the same: The defendant is faced with a potentially longer prison term as a consequence of successfully moving for a mistrial.

Motley, 655 F.2d at 188-89.

Similarly, the superseding indictment against Mr. King adds DKP, a corporation wholly owned by Don King. Any financial penalty faced by the corporation, if convicted, would necessarily be taken from Mr. King's pocket. And, the collateral consequences flowing from a corporate conviction, including potential loss of state licenses, would directly impact Mr. King's personal ability to pursue his career and earn a livelihood, even if he is acquitted. For Mr. King, the appearance of vindictiveness is the same as in Motley: He is faced with a potentially staggering financial exposure to his company and loss of livelihood as a consequence of successfully moving for a mistrial.

The District Court correctly analyzed the increased risk to Mr. King as a result of the conviction of DKP. App. B at 15. The District Court correctly rejected the government's assertion that the loss of licenses was a possibility even when Mr. King was the only defendant and hence the risk of loss was the same. Id. The District Court reasoned "the fact remains that, in the event that DKP, but not King, or King and DKP, were to be convicted, King will be subjected to exposure to the burden of greater fines than if he, but not DKP, were convicted." Id. As a fight promoter, Mr. King conducts business by virtue of the licenses owned by his

corporation. Without licenses which the corporation could lose upon conviction, Mr. King would be without the means to conduct his livelihood. Consequently, the punishment to Mr. King brought about by the superseding indictment is tangible and of considerable magnitude.

Furthermore, the indictment of DKP is vindictive not only to Mr. King, but it is also vindictive with respect to DKP, which now finds itself at criminal risk because of the hotly contested mistrial. Clearly, corporations have the same right to be free of vindictive prosecution as individuals do. See United States v. Velsicol Chem. Corp., 498 F.Supp. 1255 (D.D.C. 1980)(dismissing felony indictment of company and two employees after the company had exercised its right to offer a plea of nolo contendere to a misdemeanor indictment charging only the company, which was accepted by the court over the government's objection).

In United States v. Kahn, 787 F.2d 28, 32 (2d Cir. 1986), the Court of Appeals addressed the issue of a superseding indictment on enhanced charges after a mistrial and again reasoned that vindictiveness was substantially more likely in post-trial enhancement than where charges are increased at a pretrial stage. Here, the government had the same information pretrial as it did after the mistrial. The prosecution of Mr. King alone was based on a contract submitted by DKP to Lloyd's that the government claimed was altered and falsely represented monies paid to Chavez were "non-refundable." The claim was that Mr. King was responsible although the indictment alleged that Mr. King "caused" others to act. Clearly, the prosecution could have indicted DKP for the submission of what it claimed it could prove was a false contract, whether derivative of Mr. King's alleged conduct or

otherwise. As the Court explained in Kahn, the likelihood that the post-trial enhancement was a product of prosecutorial vindictiveness is greatly enhanced.

The government's response to Mr. King's motion for a mistrial is a telling feature distinguishing this case from Kahn in which no vindictiveness was found[1]. Here, the government vehemently and vigorously opposed the motion for a mistrial even taking the highly unusual step of attempting to have the Court of Appeals issue mandamus requiring the District Court to give an Allen charge to the jury.

The government will claim, as it did below, that it

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[1] The District Court agreed with this assessment in its opinion, stating that "[t]he facts of the present case are materially different from those of Kahn. There, the government immediately consented to the defendant's motion for a mistrial, which the Court then granted. . . . Here, on the other hand, the government's 'consent' on the following day was completely irrelevant to the granting of King's motion for a mistrial. Nor did 'the cause of the mistrial lie in misconduct on the part of the jurors,' as the government suggests. . . . The mistrial had already been granted, on King's motion, over vigorous opposition by the government, before the government, the next day, said, for reasons very different than those advanced in support of King's motion, that a mistrial was appropriate. The government did not join in, or withdraw its disagreement with, the reasons advanced in support of King's motion and, since the issue was moot, the Court did not consider whether the press report cited by the government [reporting jury contamination] was true, and a valid ground for a mistrial." Appendix B at 23a.

"consented" to the mistrial the day after it was ordered over its objection. This "consent" followed exhaustion of all efforts to overturn the District Court's order. This is not consent. It is pretextual acquiescence in the face of lawful authority. See e.g., Bumper v. North Carolina, 391 U.S. 543 (1968).

The government opposed the mistrial and, despite its transparent attempt to claim "consent," the fact is that the trial court granted the mistrial on Thursday, November 16, and only stayed effectuation of its Order discharging the jury when asked to do so by Circuit Judge Mahoney in response to the proposed mandamus petition[2]. Kahn

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[2] The mistrial cases argued by the prosecution below are consistent with the view that the determination of whether the presumption of vindictiveness arises is directly tied to the prosecution's position on the mistrial application. In United States v. Whaley, 830 F.2d 1469, 1479 (7th Cir. 1987), the trial court declared a mistrial sua sponte; neither party requested or objected to the decision. Accordingly, no presumption of vindictiveness arose. Similarly, in United States v. Fiel, 35 F.3d 997, 1008 (4th Cir. 1994), the trial court sua sponte and without objection declared a mistrial. In United States v. Punelli, 892 F.2d 1364, 1367 (8th Cir. 1990), the trial court declared a mistrial after twice directing the jury to continue deliberations and finding genuine deadlock. There is no suggestion in the opinion that either party objected to the declaration of the mistrial at any stage. And, finally in United States v. Contreras, 108 F.3d 1255, 1263 (10th Cir. 1997), the court repeatedly noted that the mistrial was declared without objection and the defendant had not "exercise[d] a specific legal right" as a predicate to the creation of the presumption.

teaches that in the case in which the government opposes the mistrial and then brings a superseding indictment with enhanced penalties, vindictiveness is most likely the motivating factor behind the government's conduct. In Kahn, the Court stated:

> We emphasize that we do not have a situation before us where the district court granted defendant's motion for a mistrial, over the government's objection, due to some error in the conduct of the trial, see e.g., United States v. Jamison, 505 F.2d 407 (D.C. Cir. 1974)(prosecutorial vindictiveness found where government reindicted defendant on more serious charges), or where, over the government's objection, the court has granted the defendant's motion for a mistrial because of a hung jury, see United States v. Motley, 655 F.2d 186 (9th Cir. 1981)(prosecutorial vindictiveness found where defendant reindicted on more serious charges). We, accordingly, express no opinion regarding the appropriateness of a presumption of prosecutorial vindictiveness in such circumstances. Kahn, 787 F.2d at 33.

It is also clear that the superseding indictment against DKP constituted an enhancement against Mr. King. Mr. King promotes fights under the auspices of DKP which holds the licenses in various states where Mr. King promotes matches. If in a retrial, Mr. King is acquitted, a conviction of DKP could put Mr. King, personally, out of business. Any fine against the corporation is effectively a fine against its 100 percent sole owner -- Don King. The new indictment, therefore, clearly puts Mr. King at greater risk due to the potential fine and loss of licenses that can be imposed on his corporation.

C. Courts Have Consistently Found Vindictiveness Where the New Charge or Charges are Based Upon the Same Alleged Conduct

In United States ex rel Williams v. McMann, 436 F.2d 103, 105 (2d Cir. 1970), the Second Circuit wrote:

> We have no quarrel with the proposition that prosecutorial vindictiveness can be no less an affront to those values we characterize as "due process" than judicial vindictiveness. Pearce would have application, if a prosecutor for no valid reason charged a defendant whose first conviction had been set aside, with a more serious offense based upon the same conduct.

In United States v. Wood, 36 F.3d 945, 946-47 (10th Cir. 1994), the decision to reindict was made after the initial trial was complete and was not based upon any new evidence or change in circumstances. The indictments in Wood were made after the defendant exercised a legal right that the government opposed and the indictment was based upon the same conduct and events giving rise to the earlier indictment. Id. The Court held that "[t]he government in this case has simply not asserted any relevant change in circumstances or any other rational reason for charging Defendant in such an inherently suspect manner". Id. at 947. Therefore the government was unable to overcome the presumption of vindictiveness.

Here, the charges against Mr. King were enhanced after he exercised his right to request a mistrial. The charge against DKP is based upon the same conduct and events as the charge against Mr. King. The superseding

indictment is virtually the same as the original indictment except it adds the corporation which effectively ups the ante for Mr. King personally. As a result, the government's decision to reindict Mr. King and to add DKP as a defendant on the new charges is inherently suspect.

II. THE COURT OF APPEALS' OPINION IMPROPERLY ESTABLISHED A DANGEROUSLY LOW BURDEN ON THE GOVERNMENT BY HOLDING THAT A PROSECUTORIAL "STRATEGY" ADMITTEDLY DESIGNED TO OBTAIN A CONVICTION COULD BE A LEGITIMATE OBJECTIVE REASON SUFFICIENT TO REBUT THE PRESUMPTION OF PROSECUTORIAL VINDICTIVENESS INHERENT IN A SUPERSEDING INDICTMENT

The Tenth Circuit has held that "[a] presumption of vindictiveness may be rebutted with a showing of `legitimate, articulable, objective reasons' for the superseding indictment." United States v. Contreras, 108 F.3d 1255, 1263 (10th Cir. 1997), citing, United States v. Raymer, 941 F.2d 1013, 1040 (10th Cir. 1991). The burden is on the government to demonstrate that its actions were "justified by independent reasons or intervening circumstances which dispel the appearance of vindictiveness." United States v. Griffin, 617 F.2d 1342, 1347 (9th Cir. 1980). In Faux v. Jones, 728 F.Supp. 903, 909 (W.D.N.Y. 1990), the government's burden was to divine the "objective information in the record" to justify the more severe re-prosecution. Quoting, United States v. Goodwin, 457 U.S. 368, 374-75 (1982).

The Court of Appeals here held that the government's legitimate, articulable, objective reason sufficient to dispel the presumption of vindictiveness inherent in bringing the superseding indictment with enhanced penalties was that the government wanted to "increase the likelihood that at least one of the defendants would be convicted." Appendix A at 11a. This cannot be sanctioned as a legitimate articulable reason or the doctrine of prosecutorial vindictiveness would be eviscerated. Always the government's underlying motivation is to convict. To permit the desire for a conviction to rebut the presumption of prosecutorial vindictiveness effectively negates the carefully crafted constitutional protection.

No independent reasons, no intervening circumstances and no objective information in the record appears to justify the superseding indictment that added DKP as a defendant. Having conceded that indicting Mr. King's wholly owned corporation enhanced and "upped the ante" as to Mr. King individually, the prosecution's entire justification for adding the corporation was based upon a purported change in "strategy." While forced to concede that the corporation could have been indicted in the first instance by reason of its derivative liability for Mr. King's alleged conduct, the prosecution argued -- and the Court of Appeals agreed -- that the belated indictment of the corporation after the hotly contested mistrial was justified because Mr. King, during a lengthy cross-examination, purportedly had tried to shift blame for any misconduct to the corporation. This was based upon two of Mr. King's answers during a six-hour cross-examination in which Mr. King, in response to hypothetical leading questions, said it would have been 'wrong" and "deceptive" to add the rider to the contract in question. The Court of Appeals reversed the District Court on this flimsy basis even

though Mr. King's two answers added little if anything to a charge which could have been brought in the first instance against the corporation on the basis of derivative liability, and which the prosecution deliberately and strategically admittedly chose not to pursue in 1994. Moreover, the Court of Appeals, despite the tradition of deferring to the trial court's view of the evidence absent a "clearly erroneous" determination, gave no credence and paid no attention to the District Court's finding, clearly supported by the record, that Mr. King's two answers were susceptible to an interpretation that blamed no one for criminal wrongdoing.

Once the presumption of vindictive prosecution is found to apply, it "cannot be overcome unless the government proves by a preponderance of the evidence that events occurring since the time of the original charge (sic) decision altered [the] initial exercise of the prosecutor's discretion.'" United States v. Krezdorn, 718 F.2d 1360, 1365 (5th Cir. 1983)(*en banc*), cert. denied, 465 U.S. 1066 (1984).

Krezdorn set the proper standard by which the analysis should proceed in prosecutorial vindictiveness cases. Krezdorn held that in order to rebut the presumption of vindictiveness, the government must demonstrate that the new charges could not have been brought when the original indictment was filed. This case also involved a mistrial and relied upon consistent language from Blackledge. In Blackledge, the Supreme Court said, in language which has never been modified, that:

> This would clearly be a different case if the State had shown that it was impossible to

> proceed on the more serious charge at the outset, as in Diaz v. United States, 223 U.S. 442. In that case the defendant was originally tried and convicted for assault and battery. Subsequent to the original trial, the assault victim died, and the defendant was then tried and convicted for homicide. Obviously, it would not have been possible for the authorities in Diaz to have originally proceeded against the defendant on the more serious charge, since the crime of homicide was not complete until after the victim's death. Blackledge, 417 U.S. at 28.

The government's proffered reason for the subsequent indictment clearly demonstrates that it was not impossible for the government to proceed against DKP from the outset. The government's decision not to indict DKP originally was simply a strategy decision. When the original strategy did not result in a conviction, the government put into effect the strategy it held in reserve. In the government's affidavit, Mr.Weiss admitted this strategy:

> A new jury, or some members of it, could believe King's testimony and the defense that there had been a scheme perpetrated by others at the corporation without King's knowledge. If a jury were to reach that conclusion, it could reach a verdict justified by the evidence against the corporation but [not] for King. The jury could ground a split verdict in the evidence. It was primarily to meet this possibility that the Office decided to seek a superseding indictment. Weiss Affidavit at 11.

In and of itself, this strategy appears vindictive and retaliatory against Mr. King or against any accused whom the government has failed to convict. It cannot be said that compromise verdicts are favored by law. Jurors are human. No notion of justice is served by a compromise verdict resulting from the fatigue and strain of jury deliberations and a trading of votes in order to go home. Mr. Justice Stevens, concurring in Bail v. United States, 470 U.S. 856, 868 (1985), defined the reality:

> Moreover, where the prosecution's evidence is weak, its bringing of multiple charges rather than one gives the prosecution "the advantage of offering the jury a choice -- a situation which is apt to induce a doubtful jury to find the defendant guilty of the less serious offense rather than to continue the debate as to his innocence." Cichos v. Indiana, 385 U.S. 76, 81, 87 S.Ct. 271, 273, 172 L.Ed. 175 (1966)(Fortas, J., dissenting from dismissal of certiorari).

The approach taken by the government is wrong and should not be endorsed at any level. The approach, if sanctioned, would permit the government to simply change its strategy and to have this change represent a sufficient reason to rebut the presumption of vindictiveness. Here, the Court of Appeals conceded that DKP could have been indicted in the first instance under principles of derivative liability (which is unquestionable); however, based upon two of Mr. King's answers and a gross misinterpretation of the trial record, the Court of Appeals actually approved the "strategy" of indicting DKP as a means of obtaining a conviction at all costs.

In Motley, a complicated RICO indictment resulted in a contested mistrial. The government's "strategy" in the second trial was to streamline the indictment by eliminating the RICO counts and limiting itself to certain substantive charges. Motley, 655 F.2d at 187. There were two defendants involved and the new indictment enhanced the charges against only one. The Ninth Circuit held that a "strategy" of simplifying the indictments was not an excuse or sufficient rebuttal of vindictive prosecution where, as here, the charges were enhanced. Motley stands in stark contrast with the Court of Appeals for the Second Circuit's position in Mr. King's case.

The government chose not to indict DKP in 1994, even though evidence of Mr. King's guilt would have been sufficient to convict DKP. In fact, the government conceded that it would have been possible to indict DKP along with Mr. King in the original indictment in 1994, but that a conscious decision was made to indict only Mr. King. The government stated: "[T]he reason that the government decided to enhance is not because we thought it would have been impossible to indict the corporation before and that it only became possible afterwards. . . . That was not the motivation." (Transcript of June 6, 1997, Hearing at 43 (emphasis added)). The prosecutor's admission that Mr. King would bear the enhanced financial burden of a DKP conviction should be conclusive on the question of the government's vindictive motive.

CONCLUSION

For all of the foregoing reasons, petitioner, Don King, respectfully request that the petition for writ of certiorari should be granted.

Respectfully submitted,

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February 13, 1998

Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1042 August Term 1997
Argued: September 11, 1997 Decided: October 1, 1997

Docket No. 97-1495

UNITED STATES OF AMERICA,

Appellant,

- against -

DON KING and DON KING PRODUCTIONS, INC.,

Defendants-Appellees.

Before: WINTER, Chief Judge, FEINBERG and NEWMAN, Circuit Judges.

Appeal from order of United States District Court for the Southern District of New York, McKenna, J., dismissing for prosecutorial vindictiveness indictment of corporation added to indictment of sole shareholder of corporation after first trial of shareholder ended in mistrial.

Reversed.

BARUCH WEISS, New York, NY, Assistant United States Attorney, Southern District of New York (Mary Jo White, United States Attorney for the Southern District of New York, Christine H. Chung, Laura Grossfield Birger, Assistant United States Attorneys, on the brief) for Appellant.

PETER E. FLEMMING, New York, NY (Curtis, Mallet-Prevost, Colt & Mosle, Benard V. Preziosi, Jr., Michael Quinn, on the brief), for Defendant-Appellee King.

WILLIAM H. MURPHY, JR., New York, NY (William H. Murphy, Jr. & Associates, William H. Murphy, III, Anthony B. Covington, Deborah Liu, on the brief) for Defendant-Appellee Don King Productions, Inc.

OPINION

FEINBERG, Circuit Judge:

The government appeals from an order of the United States District Court for the Southern District of New York, Lawrence M. McKenna, J., dismissing for prosecutorial vindictiveness a superseding indictment as to defendant Don King Productions, Inc. (the "Corporation") obtained after the trial on the original indictment, which charged only defendant Don King individually, ended in a mistrial. The district court found that the indictment of the Corporation constituted an enhancement of the potential penalties faced by King, the Corporation's 100% shareholder. The court ruled that because of the circumstances surrounding the mistrial this enhancement raised a presumption of vindictiveness, which the government failed to rebut. For reasons set forth below, we reverse.

I. Background

Defendant King is a well-known boxing promoter who operates his business by means of the wholly-owned Corporation, which also holds the various licenses from state athletic commissions that are needed to engage in the promotion of boxing matches. In 1991, King obtained (through the Corporation) a $750,000 insurance policy from a syndicate of Lloyd's of London underwriters, hereafter referred to as

the Insurer. The policy insured the Corporation against certain losses in the event that a scheduled boxing match between Julio Cesar Chavez and Harold Brazier was cancelled due to the non-appearance of one of the boxers. Shortly before the fight Chavez was injured while sparring, and the fight was postponed. After the postponement, the Corporation filed a claim with the Insurer for over $670,000 and submitted documents to support this claim, including what purported to be the contract between Chavez and King regarding promotion of the Chavez-Brazier fight.

In July 1994, King was indicted on nine counts of violation of the wire-fraud statute, 18 U.S.C. §1343, in connection with this insurance claim. Particularly at issue is language typed at the bottom of the first page of the contract submitted to the Insurer, which reads in relevant part "350,000.00 for maintenance non-refundable training expenses hereby acknowledged and received by JULIO CESAR CHAVEZ" (the "Rider"). The government alleges that King added this language to the contract after the injury to Chavez in order to convince the Insurer (falsely) that King had paid Chavez $350,000 in non-refundable money, for which King was now entitled to reimbursement under the policy. The government claims that King and Chavez had not made this arrangement, and that a payment by King to Chavez, which King used to support part of the insurance claim, was considered by both King and Chavez to be a loan. It further alleges that loans, being refundable, are not covered by the policy. King disputes, among other things, the government's interpretation of both the terms of the contract between King and Chavez and the scope of coverage of the insurance policy, and asserts that no fraud took place. Significantly for our purposes, at trial King also disclaimed personal involvement in the preparation of the insurance claim. Although the same facts would have supported an indictment of the Corporation, the government

decided not to indict the Corporation at the time it originally charged King.

Jury selection for the trial began on September 21, 1995 and the jury began to deliberate on November 13. On November 15, one juror (who was African-American) reminded the court that she had long-standing plans to leave the country on November 17. The juror had informed the court of these plans at the outset of jury selection and had been left on the jury in the hope that the trial would conclude by then, and with the assurance of Judge McKenna that she would be able to go on the trip. On November 16, the jury indicated that a majority of jurors felt the jury was "irretrievably deadlocked."

Citing both the deadlock and the impending loss of an African-American member of the jury, King moved for a mistrial on November 16, 1995. The prosecution objected to a mistrial and instead requested an *Allen* charge. Allen v. United States, 164 U.S. 492 (1896). With respect to the imminent departure of one juror, the prosecution suggested that deliberations could continue with eleven jurors, pursuant to Fed. R. Crim. P. 23(b). Judge McKenna decided not to give an *Allen* charge and instead to discharge the jury. At the request of the government, Judge McKenna delayed discharging the jury so that the prosecution could seek a writ of mandamus ordering him to give an *Allen* charge.

That afternoon the parties appeared before Judge Mahoney of this court, who set the matter for argument before the next day's regularly-scheduled panel and asked Judge McKenna to await the panel's determination. Later that evening, the prosecution withdrew its mandamus petition, explaining to Judge Mahoney that it could not meet the standard for a writ of mandamus. The next morning, November 17, Judge McKenna indicated that since the petition for a writ of mandamus had been withdrawn, he was

ready to discharge the jury. The prosecution stated that, in light of a press report it had received the previous night indicating that certain jurors had discussed the case with an alternate, it now joined in the motion for a mistrial. The judge declared a mistrial and the jury was discharged.

In March 1997, after the judge had denied King's post-trial motion for a judgment of acquittal pursuant to Fed. R. Crim. P. 29(c), the government obtained a superseding indictment, which contained the same nine counts against King but added the Corporation as a defendant on seven of the counts. Thereafter, King and the Corporation moved to dismiss the indictment as to the Corporation for prosecutorial vindictiveness.

In an opinion filed in August 1997, Judge McKenna found no evidence of actual vindictiveness on the part of the prosecution. However, he held that the circumstances of the mistrial gave rise to a rebuttable presumption of vindictiveness with respect to the added charges, found that the government had failed to rebut the presumption and, accordingly, dismissed the indictment as to the Corporation. King remains a defendant.

This appeal by the government followed. We expedited the appeal because commencement of the retrial is imminent.

II. Discussion

The doctrine of prosecutorial vindictiveness has its roots in two Supreme Court decisions: North Carolina v. Pearce, 395 U.S. 711 (1969), and Blackledge v. Perry, 417 U.S. 21 (1974). In the former case, Pearce successfully appealed a conviction and was retried on the same charges. He was convicted again, and received a longer sentence than at his first trial. The Supreme Court held that such an increase in sentence, unless supported by independent reasons in the

record, violates due process because it appears to penalize a defendant for exercising his right to appeal. In *Blackledge*, the defendant exercised a state-law right to retrial de novo of his misdemeanor conviction. Before retrial, the prosecution indicted the defendant on a felony charge based on the same conduct. The Supreme Court, applying the reasoning of *Pearce*, held that this prosecutorial conduct also violated due process. Actual vindictiveness must play no part in a prosecutorial or sentencing decision and, "since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of [his rights]," the appearance of vindictiveness must also be avoided. Pearce, 395 U.S. at 725; Blackledge, 417 U.S. at 28.

This need to avoid the appearance of vindictiveness has taken the form of a presumption of prosecutorial vindictiveness, United States v. Goodwin, 457 U.S. 368, 373 (1982), applied when (but only when) the circumstances of a case pose a "realistic likelihood" of such vindictiveness, Blackledge, 417 U.S. at 27. When the presumption is applied, it may be rebutted "by objective evidence justifying the prosecutor's action." Goodwin, 457 U.S. at 376 n.8. Otherwise, the tainted action must be thrown out.

A vindictive motive "will be found where there is direct evidence of actual vindictiveness, or a rebuttable presumption of a vindictive motive may arise under certain circumstances." United States v. White, 972 F.2d 16, 19 (2nd Cir. 1992). See also Lane v. Lord, 815 F.2d 876, 879 (2nd Cir. 1987); United States v. Contreras, 108 F.3d 1255, 1262 (10th Cir. 1997). Judge McKenna found no evidence here of actual vindictiveness on the part of the prosecution, a finding with which we agree. The Corporation can prevail, therefore, only if vindictiveness can be presumed from the facts of this case and the governmemt failed to rebut this presumption.

A. Presumption of Vindictiveness

In this circuit, we have declined to apply a presumption of vindictiveness to a superseding indictment following a mistrial to which the government consented. United States v. Khan, 787 F.2d 28 (2nd Cir. 1986). We have also declined to presume vindictiveness when the superseding indictment after a mistrial does not expose the defendant to a greater term of imprisonment. Lane v. Lord, 815 F.2d 876.

We note that a mistrial following a jury deadlock is commonplace. Our decision in Lane v. Lord makes clear that simply adding charges after a mistrial does not, in itself, raise the realistic likelihood of vindictiveness contemplated by *Blackledge*. Here, Judge McKenna found that the circumstances of this mistrial removed it from this general rule. The government challenges this ruling.

The government argues that after its "short-lived" opposition it consented to the mistrial here on the grounds of possible juror misconduct, and that under *Khan* no presumption should apply. King, by contrast, characterizes the intensity of the prosecution's opposition to the mistrial as "unprecedented." Judge McKenna stated that the prosecution's consent came after he had decided to grant King's mistrial motion and did not, therefore, negate its earlier opposition to a mistrial.

In *Khan* we expressed no opinion on whether government opposition to a mistrial motion gave rise to a presumption of vindictiveness. 787 F.2d at 33. Because the government here withdrew its opposition between November 16 and 17, arguably we are still not faced with that situation. If, by the morning of November 17, the government agreed that a mistrial was a necessity then "[i]t is difficult to see how [declaration of a mistrial] would prompt a prosecutor to act vindictively towards a defendant." Id.

However, the issue is not simply whether the government initially opposed the mistrial, but rather whether the "totality of the objective circumstances," makes it likely that the superseding indictment was sought in retaliation for King's invocation of a permitted procedure. Contreras, 108 F.3d at 1263. King argues that the prosecution sought a superseding indictment only because he had moved for a mistrial, and that the addition of the Corporation as a defendant greatly enhances his exposure to financial loss as a result of imposition of criminal penalties. The government argues, in disagreement with United States v. Motley, 655 F.2d 186, 189 (9th Cir. 1981), that no presumption of vindictiveness arises where the mistrial was caused by the deadlocked jury, rather than the defendant, and also contends that a presumption is unwarranted because the government ultimately consented to the mistrial motion, after learning of discussions between jurors and an alternate juror.

Preliminarily, we note that it is open to question whether the exposure of a corporation to criminal fines creates the type of consequence for the corporation's sole shareholder that can ever give rise to a valid claim of vindictive prosecution. Because the Corporation holds the licenses under which King operates his business as a promoter, King maintains that a conviction of the Corporation would result in revocation of those licenses and deprive him of his livelihood. The government responds that a conviction of King as an individual would most likely have the same result.

King also points out that the Corporation is subject to higher fines than King individually, and that as a 100% shareholder he will bear the brunt of this financial penalty. Compare United States Sentencing guidelines, §5E1.2 (fine schedule for individuals) with §§8C2.4-6 (fine schedule for organizations). The government, surprisingly, concedes this point, acknowledging that as a practical matter King will pay any fines levied against the Corporation, and choosing in-

stead to argue that the increase is not "grossly disproportionate" to the prior indictment. See United States v. Pignatiello, 628 F.Supp. 68 (D.Colo. 1986). However, it is not clear to us that depriving a corporation of an asset (be it money or a license) is, for the purposes of prosecutorial vindictiveness analysis, equivalent to penalizing even a 100% shareholder of a corporation. Nor do we think a shareholder should so easily be able to disregard the corporate form when it suits his purposes. If the government were attempting to pierce the corporate veil to hold King personally liable for the acts of his corporation, we doubt that King would be arguing the inconsequentiality of corporate structure. King implicitly took the position at his trial that he is shielded from liability for corporate acts by his defense that if a fraud occurred, someone else at the Corporation was responsible for it.[1]

However, because we hold below that the government has demonstrated a non-vindictive motive sufficient to overcome any presumption, we need not resolve any of these issues — including whether King can complain about the

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[1] For example, in his opening argument at the trial, King's defense counsel stated that

> [King] doesn't do everything by himself. He does what he does best and leaves other things which are necessary to this business to those he employs. One of the things he leaves to somebody else is insurance.

Counsel also said, in reference to the alleged altered contract, "I am afraid the guy who made up this, I'm sorry, fouled it up a little bit."

On cross-examination, King agreed that if the Rider was added to the contract it was done without his authorization or knowledge, and that adding the language to the contract after the injury to Chavez, and submitting the altered contract to the Insurer would have been "wrong" and "deceptive."

The defense closing argument also emphasized that other employees of the Corporation were involved in the insurance claim.

exposure of the Corporation to fines, whether new charges following a mistrial resulting from a hung jury can give rise to a presumption of vindictiveness, and whether the government's joining in the mistrial motion precluded such a presumption. We will assume, without deciding, that a presumption of vindictiveness was justified, and turn now to the government's effort to rebut this presumption. See Texas v. McCullough, 475 U.S. 134, 141 (1986).

B. Rebutting the Presumption of Vindictiveness

A presumption of vindictiveness may be rebutted. McCullough, 475 U.S. at 141 (''Nothing in *Pearce* is to be read as precluding a rebuttal of intimations of vindictiveness.''). King argues that since it was not impossible for the government to indict the Corporation at the outset it is precluded from doing so now (the ''impossibility standard''). King points out that the Supreme Court in *Blackledge*, after holding that the state could not respond to Perry's appeal by bringing a more serious charge, noted that ''[t]his would clearly be a different case if the State had shown that it was impossible to proceed on the more serious charge at the outset.'' 417 U.S. at 29 n.7. The Fifth Circuit, in United States v. Krezdorn, 718 F.2d 1360, 1363 (5th Cir. 1983) (in banc), apparently took this to mean that to rebut vindictiveness a prosecutor must show that it was impossible to bring the added charges before the first trial. We disagree with this impossibility standard, and read *Blackledge* to mean simply that impossibility is one, but not the only, way to rebut a presumption of prosecutorial vindictiveness. Indeed, if impossibility were the standard, prosecutors would be motivated to include all possible charges in every indictment, a result we do not wish to promote.

A presumption of vindictiveness may be rebutted with a showing of ''legitimate, articulable, objective reasons'' for the superseding indictment. Contreras, 108 F.3d at 1263.

"[T]he burden is shifted to the prosecutor to show that his decisions were justified by independent reasons or intervening circumstances which dispel the appearance of vindictiveness." United States v. Griffin, 617 F.2d 1342, 1347 (9th Cir. 1980). See also United States v. Motley, 655 F.2d at 188 n.1. When the government meets its burden of showing that its actions are the result of non-vindictive motivations, a defendant's right to move for a mistrial should not properly be regarded as chilled for purposes of applying the doctrine of prosecutorial vindictiveness. Although defendants may be reluctant to exercise that right for fear that the government will apply what it learned at the first trial to the defendant's detriment, that is not a fear the doctrine is designed to eliminate. United States v. Punelli, 892 F.2d 1364, 1372 (8th Cir. 1990) (taking advantage of evidence elicited at first trial is not a vindictive motive for seeking a superseding indictment after mistrial).

We think the government has clearly shown a valid prosecutorial reason for indicting the Corporation that dispels any appearance of vindictiveness: the government sought to increase the likelihood that at least one of the defendants would be convicted. When King was first indicted, the government reasonably believed that King's defense would consist of denying that the misrepresentations charged in the indictment had been made. In those circumstances, an indictment had been made. In those circumstances, an indictment of the Corporation would not have increased the likelihood of obtaining a conviction: the jury would either believe the government's theory and convict both King and the Corporation, or believe King and acquit both. At trial, however, King's defense attorney made statements during the opening and closing arguments, and King gave answers under cross-examination, which would have been consistent with a jury finding that a fraud had occurred but that someone at the Corporation other than King was responsible for

it. See note 1, supra. The government asserts — and we believe the record shows — that it indicted the Corporation after the mistrial in order to give the jury in a retrial a reasonable basis for a split verdict (acquittal of King and conviction of the Corporation). Under the circumstances, dismissal of the indictment for prosecutorial vindictiveness was unwarranted.[2]

King argues that having originally sought to avoid a split verdict, the government should not now be permitted to pursue one. We disagree. Although a defendant is entitled to be free from retaliation after an appeal or mistrial, he cannot legitimately expect that the government will not learn from the first trial. United States v. Wall, 37 F.3d 1443, 1449 (10th Cir. 1994); Punelli, 892 F.2d at 1372; Motley, 655 F.2d at 190-191.

On the record before us, we think the government has adequately rebutted any presumption of vindictiveness that might be deemed to apply in this case. The events at King's first trial reasonably convinced the prosecutors that an indictment of King's corporation would improve their chances of getting the jury to convict at least one of the defendants. The superseding indictment was the result of prosecutorial strategizing, not prosecutorial vindictiveness. It was not, therefore, improper to add the corporate defendant, a party that we expect will be tried in a joint trial with its controlling shareholder.

We reverse the order of the district court dismissing the indictment against the Corporation and remand for further proceedings consistent with this opinion.

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[2] We of course express no view as to whether conviction of either King or the Corporation is warranted at the retrial.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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94 Cr. 455 (LMM)

UNITED STATES OF AMERICA

- v -

DON KING and DON KING PRODUCTIONS, INC.,
Defendants.

MEMORANDUM AND ORDER

[stamp—Copies Mailed to Counsel of Record AUG 22 1997]

McKENNA, D.J.

1.

Defendants move for dismissal of the superseding indictment (i) as to defendant Don King Productions, Inc. ("DKP"), on the ground of prosecutorial vindictiveness, and (ii) as to both defendants, on the ground that the determination to prosecute them violates Department of Justice Guidelines.

2.

Defendants' argument that the superseding indictment should be dismissed as to DKP on the ground of prosecutorial vindictiveness is premised on the following facts. The original indictment, filed in July of 1994, charged defendant King, only, with nine counts of wire fraud (18 U.S.C. § 1343) in connection with an alleged scheme to defraud the issuers, certain Lloyd's syndicates, of a non-appearance and/or cancellation insurance policy for a boxing match

between Julio Cesar Chavez and Harold Brazier, which was cancelled when Chavez was injured during training. The trial on the first indictment ended in a mistrial, on King's motion, when the jury was unable to reach a verdict. The government subsequently obtained a superseding indictment, filed in March of 1997, in which DKP was added as a defendant, and charged with seven of the nine wire fraud counts with which the superseding indictment again charges defendant King. DKP is a corporation wholly owned by King. The superseding indictment exposes King to greater punishment than he was exposed to by the original indictment, defendants argue, because (i) a conviction of DKP, even if King were acquitted, could put King, personally, out of business, since DKP holds (and would presumably lose) the licenses pursuant to which King conducts his business as a promoter of boxing matches, and (ii) a conviction of DKP, even if King were acquitted, could result in the imposition of fines on DKP the burden of which would fall on King as the only owner of DKP, fines, moreover, in an amount potentially greater than those to which King personally is exposed, *see* 18 U.S.C. § 3571 and *compare* United States Sentencing Commission, Guidelines Manual, § 581.2 (fines for individuals), with *id.* § 8C2.1-8 (fines for organizations), or, if both defendants were convicted, the imposition on King not only of a personal fine but, in addition, the burden, as sole owner of DKP, of a corporate fine as well.[1]

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[1] Under § 8C3.4 of the Guidelines Manual, the Court, in the event of the conviction of both King and DKP, might offset against a fine that would otherwise be imposed on DKP, the amount of any fine imposed on King. That does not, however, affect the above analysis: it is the exposure to increased punishment that is relevant in the prosecutorial vindictiveness context.

3.

The prosecutional vindictiveness rule which defendants invoke was succinctly stated in *United States v. Motley*, 655 F.2d 186 (9th Cir. 1981). "A re-indictment increasing the severity of the charges following the exercise of a procedural right creates an appearance of vindictiveness which, if not dispelled by the government, constitutes a due process violation." 655 F.2d at 188 (citation and footnote omitted). Judge Metzner summarized the reason for the rule in *United States v. Hoffer*, 683 F. Supp. 448, 448 (S.D.N.Y. 1988), "[a] defendant must be free to pursue his rights without apprehension that the government will retaliate by substituting exposure to greater punishment."

The doctrine of prosecutorial vindictiveness is rooted in *North Carolina v. Pearce*, 395 U.S. 711 (1969), where the Court considered the cases of two defendants who, having obtained new trials through state post-conviction proceedings, were, after conviction upon retrial, given longer sentences than those originally imposed. The Court found that the imposition of such sentences violated the due process clause of the Fourteenth Amendment. "Due process of law," the Court said,

> requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.

395 U.S. at 725 (footnote omitted).

In *Pearce*, the Court had considered the actions of courts. in *Blackledge v. Perry*, 417 U.S. 21 (1974), it applied *Pearce* to the action of a prosecutor. There, a defendant had been convicted of a misdemeanor assault charge and exercised his state law right to a trial *de novo* in a higher court. Prior to the trial *de novo*, the prosecutor obtained a felony assault indictment against the defendant, upon which he was convicted upon a guilty plea, thus increasing his sentencing exposure. Again, the Court found a violation of the due process clause of the Fourteenth Amendment. After noting a prosecutor's "considerable stake in discouraging convicted misdemeanants from appealing and thus obtaining a trial de novo," 417 U.S. 27, and that the rationale of *Pearce* was based not on "actual retaliatory motivation" but " 'fear of . . . vindictiveness,' " *id.* at 28 (quoting *Pearce*, 395 U.S. at 725), the Court concluded that:

> A person convicted of an offense is entitled to pursue his statutory right to a trial de novo, without apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration.
>
> Due process of law requires that such a potential for vindictiveness must not enter into North Carolina's two-tiered appellate process. We hold, therefore, that it was not constitutionally permissible for the State to respond to Perry's invocation of his statutory right to appeal by bringing a more serious charge against him prior to the trial de novo.

Id. at 28-29 (citation and footnotes omitted).

In *United States v. Goodwin*, 457 U.S. 368 (1982), the Supreme Court explained its earlier prosecutorial vindictiveness cases. The Court noted that "while an individual cer-

tainly may be penalized for violating the law, he just as certainly may not be punished for exercising a protected statutory or constitutional right.'' 457 U.S. at 372 (footnote omitted). It then explained that:

> Motives are complex and difficult to prove. As a result, in certain cases in which action detrimental to the defendant has been taken after the exercise of a legal right, the Court has found it necessary to ''presume'' an improper vindictive motive. Given the severity of such a presumption, however—which may operate in the absence of any proof of an improper motive and thus may block a legitimate response to criminal conduct—the Court has done so only in cases in which a reasonable likelihood of vindictiveness exists.

Id. at 373. The Court declined to apply ''an inflexible presumption of prosecutorial vindictiveness in a pretrial setting,'' *id.* at 381, such as the case before it where, prior to any trial, the defendant declined to plead guilty to a misdemeanor charge and was then indicted for a felony based upon the same conduct, and convicted at trial. The Court found that:

> There is good reason to be cautious before adopting an inflexible presumption of prosecutorial vindictiveness in a pretrial setting. In the course of preparing a case for trial, the prosecutor may uncover additional information that suggests a basis for further prosecution or he simply may come to realize that informaiton possessed by the State has a broader significance. At this stage of the proceedings, the prosecutor's assessment of the proper extent of prosecution may not have crystallized. In contrast, once a trial begins—and certainly by the time a conviction has been obtained—it is much more likely that the State has discovered and assessed all of the information against an accused and

> has made a determination, on the basis of that information, of the extent to which he should be prosecuted. Thus, a change in the charging decision made after an initial trial is completed is much more likely to be improperly motivated than is a pretrial decision.

Id. at 381.

In *Motley*, the Ninth Circuit applied the prosecutorial vindictiveness rule to dismiss an indictment where, after "[a] mistrial was declared on defendants' motion and over the government's objection," 655 F.2d at 187, the government obtained a superseding indictment against the defendant which exposed the defendant to a greater sentence than that to which he had been exposed at the trial of the original indictment.

The Second Circuit has twice considered the prosecutorial vindictiveness rule in the context of increased charges made after a mistrial. *United States v. Khan*, 787 F.2d 28 (2d Cir. 1986); *Lane v. Lord*, 815 F.2d 876 (2d Cir. 1987).

In *Khan*, a defendant argued that the addition of counts after a mistrial and rejection of a plea offer gave rise to a presumption of prosecutorial vindictiveness. The Court rejected the argument, and noted that

> the circumstances here pose no "realistic likelihood" of vindictiveness sufficient to warrant applying a presumption of vindictiveness. It was not the defendant's request for a trial that precipitated the possible duplication of resources and raised the spectre of the prosecution avenging the defendant's rightful exercise of a constitutional right. The root cause of these troubles was the jury's inability to agree on a verdict which in turn caused the mistrial. But the government did not object to the mistrial.

787 F.2d at 32-33. The Court noted that "[i]t is difficult to see how this would prompt a prosecutor to act vindictively towards a defendant; all agreed that the action taken by the Court was necessary under the circumstances. Defendant did nothing here that was likely to inspire the wrath of the prosecutor." *Id.* at 33 (citation omitted).

The Court emphasized, however, that "we do not have a situation before us . . . where, over the government's objection, the court has granted the defendant's motion for a mistrial because of a hung jury." *Id.* (citing *Motley*). The Court "express[ed] no opinion regarding the appropriateness of a presumption of prosecutorial vindictiveness in such circumstances." *Id.*

In *Lane*, the Court held that no presumption of prosecutorial vindictiveness arose when, after a mistrial, a superseding indictment was obtained that added a conspiracy count because the addition of that count "did not expose Lane to any greater criminal penalty than the original indictment. At lease in the mistrial context, we believe that a threat of greater punishment is required to justify a 'realistic' apprehension of retaliatory motive on the part of the prosecution." 815 F.2d at 879 (quoting *Blackledge*, 417 U.S. at 27).

4.

Prosecutorial vindictiveness may be shown in two ways. As summarized in *United States v. White*, 972 F.2d 16 (2d Cir.) *cert. denied*, 506 U.S. 1026 (1992), "[a]lthough a vindictive motive is often difficult to prove, one will be found where there is direct evidence of actual vindictiveness, or a rebuttable presumption of a vindictive motive may arise under certain circumstances." 972 F.2d at 19 (citing *Pearce*, 395 U.S. at 725 n.20, and *Goodwin*, 457 U.S. at 373 and 384 n.19).

The government acknowledges that:

> Normally the post-trial addition of charges does trigger a presumption of vindictiveness; since the relevant facts are generally crystallized in preparation for the first trial, presumably the post-trial addition of new charges derives not from new facts but from a desire to punish the defendant for having pursued his or her post-trial rights. By contrast, a *pre-trial* Superseding Indictment is generally not assumed to be vindictive, since at such time it is presumed to be part of the flexible "'give-and-take' of plea bargaining."

(Gov't Mem. at 6 (quoting *Lane*, 815 F.2d at 878).) It argues, however, that the presumption of prosecutorial vindictiveness does not arise in this case, and that, even if it does, it is rebutted.

5.

The government advances two arguments in support of the proposition that no presumption of prosecutorial vindictiveness arises here.

First, the government argues that "the pre-trial absence of presumption applies." (Gov't Mem. at 7.) "Of crucial importance to this motion is [the] fact that, as a result of juror misconduct not attributable in any way to King, the Government consented to, indeed joined in the request for a mistrial." Citing *Khan*, the government suggests that "the cause of the mistrial lies in misconduct on the part of the jurors" (*id.*), and argues that:

> In short, there is no presumption of vindictiveness, since the Government — after its very short-lived opposition to the defense motion for a mistrial — thereafter dropped its opposition and joined in the request. It is simply silly to suggest that the Government acted

> vindictively in superseding the indictment when the mistrial was the very result that it too sought under the unusual circumstances of the case.

(*Id.* (footnote omitted).)

This assertion requires a close look at the facts. The mistrial was the result of a note from the jury, on November 16, 1995, that stated: "Certain members of the jury (a majority) have reached the conclusion that we are irretrievably deadlocked and will be unable to reach a unanimous verdict on any of the counts charged." (Tr. 3168 (quoting Court Ex. 13).) The government immediately asked for an *Allen* charge, and King for a mistrial. (Tr. 3168.) The Court declined to give an *Allen* charge (*id.* 3178), and granted King's motion for a mistrial. (*Id.* 3179 ("I am going to discharge the jury on the basis of their note").) The government requested that the jurors be held pending Second Circuit review (*id.* 3180), and the Court agreed to hold the jurors "at least until 4:30" to "give [the government] a chance to get a stay." (*Id.* 3182-83.) Counsel for the government and King then (this Court understands) appeared before Hon. J. Daniel Mahoney of the Court of Appeals. This Court, later in the day, instructed the jury to return the following day, having "been so requested by [a] judge of the Court of Appeals [*i.e.*, Judge Mahoney] and my understanding is the Court of Appeals will make this the first order of business of whatever three judge panel is the panel for tomorrow." (*Id.* 3185-86.) The following morning, November 17, 1995, the Court received a copy of a letter from the government to Judge Mahoney, dated November 16, 1995, *i.e.*, the previous day, which is not referred to in the government's brief. The letter states, in full:

> I am writing concerning the stay motion filed in the above-captioned case earlier today.

> After further consideration, the Government has reluctantly decided not to file a petition for a writ of mandamus concerning Judge McKenna's decision to discharge the jury in the above-captioned case. While we believe that Judge McKenna abused his discretion in deciding to discharge the jury prematurely, the issue — for purposes of a mandamus petition — is whether his action presents "a novel and significant question of law," and whether his action presents a "legal issue whose resolution will aid in the administration of justice." *In Re United States*, 903 F.2d 88, 89 (2d Cir. 1990). We have concluded that that standard is not met here. Accordingly, we will not pursue this matter further in this Court.

This Court, noting that "I made a decision yesterday and I in effect stayed effectuating that decision, first to allow the government to go to the Court of Appeals and then, secondly, I had the jury come in at the request of Judge Mahoney because — so as not to moot it . . ." (Tr. 3190), said "[t]he petition for a writ having been withdrawn by the government, I have a decision, I don't see why the next order of business is not to bring the jury in and discharge them." (*Id.* 3190-91.) The government *then* raised the question of "juror misconduct" (Gov't Mem. at 7) and took the position that "a mistrial has to be declared." (Tr. 3191.)[2] When all of the jurors had arrived, the jury was discharged. (Tr. 3195.)

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[2] The government said that a "press report which we received notice of last night that apparently two of the jurors have discussed their deliberations with others outside the jury" was "the reason we did not pursue further the issue of your Honor's decision not to give an Allen charge and to discharge the jury as your Honor announced yesterday." (Tr. 3191.) But that is not what the government had told Judge Mahoney.

The facts of the present case are materially different from those of *Khan*. There, the government immediately consented to the defendant's motion for a mistrial, which the court then granted. 787 F.2d at 33 (quoting trial transcript). Here, on the other hand, the government's "consent" on the following day was completely irrelevant to the granting of King's motion for a mistrial. Nor did "the cause of the mistrial lie[] in misconduct on the part of the jurors," as the government suggests. (Gov't Mem. at 7.) The mistrial had already been granted, on King's motion, over vigorous opposition by the government,[3] before the government, the next day, said, for reasons very different than those advanced in support of King's motion, that a mistrial was appropriate. The government did not join in, or withdraw its disagreement with, the reasons advanced in support of King's motion. And, since the issue was moot, the Court did not consider whether the press report cited by the government was true, and a valid ground for a mistrial.[4]

In view of the government's opposition, for reasons it never abandoned, to King's successful motion for a mistrial, the government's after the event suggestion, premised on reasons very different from, and unrelated to, those advanced on behalf of King, that a mistrial would be appropriate, does not bring the present case within *Khan*. The rationale underlying the prosecutorial vindictiveness cases is based

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[3] The government's application to the Court of Appeals, even though subsequently abandoned (whether for the reason given to Judge Mahoney or the reason given to this Court), demonstrates the intensity of its opposition to King's motion.

[4] Had a mistrial not already been granted, the normal next step in the light of the government's information of a press report of jurors speaking to persons outside of the jury would presumably have been to interview some or all of the jurors. *See United States v. Aiello*, 771 F.2d 621, 629 (2d Cir. 1985). The government did not ask the Court to do so.

on "'fear of . . . vindictiveness.'" *Blackledge*, 417 U.S. at 28 (quoting *Pearce*, 395 U.S. at 725). The cases are concerned to guard against a defendant's "apprehension" of retaliation if he asserts a right. *Pearce*, 395 U.S. at 725; *Blackledge*, 417 U.S. at 28; *Khan*, 787 F.2d at 31; *Lane*, 815 F.2d at 878; *Hoffer*, 683 F. Supp. at 448.

Here, the fact that the government, after the issue was moot, asserted the existence of a different ground for a mistrial than those successfully asserted by King leaves in place the ground for apprehension arising out of the fact that, after King's motion was granted, over the government's opposition, additional charges were made. In other words, if, at a second trial, the jury were unable to reach a verdict, King and/or DKP would certainly still have to consider whether moving for a mistrial over the government's objection might cause the government to increase the charges again. And, entirely apart from the effect of the government's action on King and/or DKP, the government's action would be a cause of apprehension in other defendants in other cases.

The government also argues that no presumption of vindictiveness applies because the "potential punishment" of the loss of licenses "was a possibility even when King was the only defendant. Now, with the corporation as a defendant, the same punishment may result even if King is acquitted. But the only change in that regard is in the *likelihood* of the anticipated punishment, not its severity." (Gov't Mem. at 8.) Even if that is so (and the Court need not pass on the question), King does remain subject, as the only owner of DKP, to more severe fines than he would be exposed to as the sole defendant. (*See supra* at 2-3.)

The government, citing *New York Central and Hudson River Railroad Co. v. United States*, 212 U.S. 481 (1909) (rejecting the argument against corporate criminal liability

that "to punish the corporation is in reality to punish the innocent shareholders," *id.* at 492) argues that, whenever a corporation is convicted of crime, "the shareholders suffer the economic consequences." (Letter Brief, June 18, 1997, at 1.) Since King is the president and sole shareholder of DKP, the government continues, "[i]t is far less 'inequitable' for King to shoulder the consequences of wrongdoing at his corporation than for the typical shareholder in a large corporation to bear the burden of a corporate conviction." (*Id.* at 2.) This argument, however, misses the point. Whatever the case may be where a corporation is the only defendant, the fact remains that, in the event that DKP, but not King, or King and DKP, were to be convicted, King will be subjected to exposure to the burden of greater fines than if he, but not DKP, were convicted. The indictment of DKP has "upped the ante." *See Blackledge*, 417 U.S. at 28.[5]

6.

The government also argues that, even if a presumption of prosecutorial vindictiveness does arise, it has been rebutted. It is clear that the presumption is a rebuttable one. *White*, 972 F.2d at 19 (citing *Goodwin*, 457 U.S. at 373, 384 n.19).

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[5] The government does not directly challenge the applicability of the prosecutorial vindictiveness cases to a situation where dismissal of charges against a party (here, DKP) is sought on the basis that the charges were made after the exercise of a right by another (albeit related) party (here, King). In *United States v. Velsicol Chemical Corp.*, 498 F. Supp. 1255 (D.D.C. 1980), Judge Parker, on a finding of prosecutorial vindictiveness, dismissed felony indictments against a corporation and two individual employees of the corporation, filed after the corporation had successfully, over government opposition, obtained the court's permission to enter a *nolo contendere* plea to the misdemeanor charges originally filed against it, rather than the guilty plea the prosecutor wished.

First, the government argues that "[a] prosecutor's showing that the new indictment resulted from newly discovered evidence, unknown to the prosecution at the time of the initial charging decision, obviously overcomes a presumption of vindictiveness." (Gov't Mem. at 9 (citing *United States v. Fiel*, 35 F.3d 997, 1008 (4th Cir. 1994), *cert. denied*, 513 U.S. 1117 (1995)).) In support of this argument, the government submits the May 22, 1997 affirmation of Assistant United States Attorney Baruch Weiss.[6] The decision to obtain a superseding indictment naming DKP, in addition to King, as a defendant, Mr. Weiss states, came about "primarily" (Weiss Aff. ¶¶ 9, 11) as follows:

> [P]rior to trial King, through counsel, had argued repeatedly that the charges in the indictment did not amount to a scheme to defraud. But then at trial, King, in his testimony, had in our view essentially conceded the existence of the scheme, although he denied any participation in it. Mr. Fleming reinforced that defense in his summation to the jury. Although we clearly continued to be of the view that the evidence showed that King himself was guilty, we reasoned that a new jury, or some members of it, could believe King's testimony and the defense that there had been a scheme perpetrated by others at the corporation without King's knowledge. If a jury were to reach that conclusion, it could reach a verdict justified by the evidence against the corporation but for King. The jury could ground a split verdict in the evidence.

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[6] Mr. Weiss was assigned to the case after the first trial to replace two of the previously assigned assistants. Assistant United States Attorney Christine Chung, who had been assigned to assist at the first trial, remains assigned to the case with Weiss. "She had not played any role in the charging decisions made in connection with the original indictment." (Weiss Aff. ¶ 3.)

(Weiss Aff. ¶ 10.) As summarily put in the government's brief, "King, in his testimony at the first trial, changed the defense strategy from one of 'no-crime' to one of 'there was a crime but I did not do it.' If the new jury believes that testimony, it will have a reasoned basis for acquitting King but convicting the corporation." (Gov't Mem. at 10.)

The only new evidence specifically cited by the government (Gov't Mem. at 4-5) in support of its argument is a brief passage from the cross-examination of King concerning Government Exhibit 500:[7]

> Q. If this rider was added to the contract, that was done without your knowledge, correct?
>
> A. Yes.
>
> Q. And certainly without your approval, correct?
>
> A. Yes.

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[7] Government Exhibit 500 is a document alleged in the original indictment to be "a document purporting to be the contract between DON KING, the defendant, and Julio Cesar Chavez for the Chavez/Brazier fight, which document was not signed or authorized by Julio Cesar Chavez and which document was not the contract entered into by Julio Cesar Chavez and DON KING, the defendant, for the Chavez/Brazier fight" which King was alleged to have "prepared and caused to be prepared, and submitted and caused to be submitted" as a part of the insurance claim. (Indictment ¶ 8.) It is again alleged in the superseding indictment, which describes the "rider" referred to in the cross-examination as the "second typed addendum to the fraudulent contract stating, in part, that $350,000 of the total $2 million purse was for 'maintenance non-refundable training expenses hereby acknowledged and received by JULIO CESAR CHAVEZ.' " (Superseding Indictment ¶ 16.)

With respect to Government Exhibit 500, see the Court's Memorandum and Order dated February 3, 1997 (denying King's post-trial motion for judgment of acquittal under Fed. R. Civ, P. 29(c)) at 9-11, 20, 24.

Q. It would have been wrong to add that rider to the contract after Mr. Chavez was injured, correct?

A. Yes.

Q. It would have been deceptive to add that rider to the contract and to submit that contract to the insurance company; isn't that a fact?

A. Yes.

(Trial Tr. 2328.)

The government's argument that the indictment of DKP "resulted from newly discovered evidence, unknown to the prosecution at the time of the initial charging decision," *Fiel*, 35 F.3d at 1008, is not convincing. The quoted testimony of King does not represent new evidence, nor even a change of defense strategy. The government has not cited, nor has the Court been able to find, any instance in which King claimed either that he prepared and submitted, or caused to be prepared or submitted, Government Exhibit 500 in support of the insurance claim, or that, if the rider was added to Government Exhibit 500 without his knowledge and without his approval, that would not have been wrong and deceptive. The idea that it would be King's position that the source of Government Exhibit 500 was someone other than King is certainly suggested in King's counsel's opening, where Mr. Fleming, speaking of King, said that, as owner of DKP, King "doesn't do everything by himself. He does what he does best and he leaves other things which are necessary to this business to those he employs. One of the things he leaves to somebody else is insurance" (Tr. 34), and, later, "Let's look at the — this is the quote-unquote altered page. I am afraid the guy that made up this, I'm sorry, fouled it up a little bit . . . ." (*Id.* at 55.)[8] King's

[8] Counsel continued to argue to the effect that the contract, *i.e.*, Government Exhibit 500, did accurately reflect certain aspects of DKP's understanding with Chavez, *e.g.*, that the purse was to be $2 million, but that is another matter.

responses to the government's hypothetical questions are certainly not inconsistent with the opening made on his behalf. Nor can it be said that King somehow changed his strategy. His strategy throughout was the hardly surprising position that the government had not proved the charges contained in the original indictment. (*See* King's counsel's closing *passim* (Tr. 2707-2820).) Nor did King ever argue that there was a crime. (*Cf.* Gov't Mem. at 10.) While the government says that "King essentially conceded that the representation made to Lloyds of London was 'wrong' and 'deceptive' " (Gov't Mem. at 4), this is not the case. In support of his post-trial motion for judgment of acquittal, King argued, among other things, that "[t]here is no evidence King (or anyone else) represented that $350,000 had been paid to Chavez in non-refundable money" (Memorandum in Support of Defendant's Motion for Judgment of Acquittal, Dec. 22, 1995, at 2) and that "[a]s we said in October 1994, and contrary to AUSA Gardephe's assertion in summation . . ., the rider to the $2 million contract [*i.e.*, Government Exhibit 500] clearly does not represent that '$350,000 in non-refundable monies had been paid to Julio Cesar Chavez.' " (*Id.* at 24-25.) King also argued that, because the Lloyd's syndicate allegedly victimized by the charged fraud was obligated to indemnify DKP, there was no possibility of economic harm, and hence no liability for wire fraud under such cases as *United States v. Mittelstaldt*, 31 F.3d 1208, 1216-17 (2d Cir. 1994), *cert. denied*, 513 U.S. 1084 (1995). (Mem. in Support of Def. Motion for Acquittal at 39-59.)

The sort of new evidence that can rebut a presumption of prosecutorial vindictiveness is illustrated in *Fiel*, a case relied on by the government. There, the superseding indictment added new counts alleging offense conduct not alleged in the original indictment, 35 F.3d at 1001, "evidence of which [the government] had obtained just two weeks prior to

the first trial'' and ''decided to proceed to trial with the indictment as it stood.'' *Id.* at 1008. Nothing of that sort occurred here, where the government could have obtained the indictment of DKP as well as King on the evidence on which it obtained the indictment of King, but chose not to do so, and where King's answers to the government's hypothetical questions in the quoted testimony could probably, on the evidence adduced by the time King testified, have been guessed, if not predicted.[9]

The government's argument that a presumption of prosecutorial vindictiveness is rebutted by a change in the Assistant United States Attorneys assigned to the case is also unpersuasive. True, in the case relied on by the government, *United States v. Ricard*, 563 F.2d 45 (2d Cir. 1977), *cert. denied*, 435 U.S. 916 (1978), in which the defendant's claim of prosecutorial vindictiveness was rejected, the court noted a change in prosecutors between the original misdemeanor information and the superseding indictment. 563 F.2d at 48.[10] In *Thigpen v. Roberts*, 468 U.S. 27 (1984), however, the Supreme Court — although it did ''not determine the correct rule when two independent prosecutors are involved,'' 468 U.S. at 31 — set forth reasoning that undermines the government's argument here, where the successive prosecutors are not independent in the sense in which the prosecutors in *Thigpen* were, but members of the

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[9] The Court must also note that the Weiss Affirmation states that the superseding indictment resulted ''primarily'' from the ''new evidence'' and ''change of strategy'' discussed above. Since the government has not disclosed the other reasons implied by the use of the word ''primarily,'' the Court cannot address them.

[10] Today, *Ricard*, which involved a pretrial increase of charges, would presumably have been decided under *Goodwin*, on the other ground that no presumption of prosecutorial vindictiveness — which the *Ricard* court assumed *arguendo*, 563 F.2d at 48 — had arisen in the first place.

same Office of the same United States Attorney.[11] The Court said:

> It might be argued that if two different prosecutors are involved, a presumption of vindictiveness, which arises in part from assumptions about the individual's personal stake in the proceedings, is inappropriate. On the other hand, to the extent the presumption reflects "institutional pressure that . . . might . . . subconsciously motivate a vindictive prosecutorial . . . response to a defendant's exercise of his right to obtain a retrial of a decided question," it does not hinge on the continued involvement of a particular individual. A district attorney burdened with the retrial of an already-convicted defendant might be no less vindictive because he did not bring the initial prosecution. Indeed, *Blackledge* referred frequently to actions by "the State," rather than "the prosecutor."

468 U.S. at 31 (quoting *Goodwin*, 457 U.S. at 377, and *Blackledge*, 417 U.S. at 28-29; other citation omitted).

The Supreme Court's reasoning in *Thigpen* applies here. The original and the superseding indictments were filed during the incumbency of the same United States Attorney who, in this particular case, must be assumed to have been responsible for the determinations to seek both indictments. Mr. Weiss, in his affirmation, does not claim that the determination to seek the superseding indictment was made by him, even if it may have been his perception that a strategy of putting the possibility of a "split verdict" before

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[11] In *Thigpen*, "the [misdemeanor] proceedings before the Justice of the Peace were the responsibility of the county prosecutor, whereas the felony indictment was obtained by the District Attorney, who was then involved in the manslaughter trial." *Id.* The Court did not have to "determine the correct rule," *id.*, because of the county prosecutor's continued involvement in the felony trial. *Id.* at 31-32.

the jury (Weiss Aff. ¶ 10) would be advantageous to the government, that informed, at least "primarily," the determination.

Mr. Weiss states that "[a]t no time was the fact that Don King had moved for a mistrial even so much as mentioned during the course of the intra-Office discussions . . . as a reason for adding the corporation as a defendant" (Weiss Aff. ¶ 8), that "[n]o one raised . . . any reason that could be construed as vindictive and retaliatory" (*id.* ¶ 9), and that the decision "to seek a superseding indictment . . . was not for any vindictive or retaliatory reason." (*Id.* ¶ 11.) Apart from the fact that, whether mentioned or not, King's successful motion for a mistrial was undoubtedly known to all concerned, and the wholly conclusory nature of Mr. Weiss' other statements, this line of argument goes to the question whether or not the prosecutor "acted in bad faith or maliciously" and there was "actual retaliatory motivation," *Blackledge*, 417 U.S. at 28, and does not affect the existence of the distinct, *see White*, 972 F.2d at 19, presumption of prosecutorial vindictiveness which arises from the facts, nor constitute a rebuttal by "objective information in the record," *Pearce*, 395 U.S. at 726 (quoted in *Goodwin*, 457 U.S. at 374), which the prosecutorial vindictiveness case law contemplates. If a conclusory denial of a vindictive motive were sufficient to defeat a prosecutorial vindictiveness claim, it does not seem likely that the Supreme Court would have found the need, in *Goodwin*, to note that "[m]otives are complex and difficult to prove" and recognized the need, "in certain cases in which action detrimental to the defendant has been taken after the exercise of a legal right . . . to 'presume' an improper vindictive motive." 457 U.S. at 373. Nor, finally, can such a denial, once the facts give rise to the presumption, eradicate the "apprehension" of retaliation which is the reason for the rule in the first place. *See supra* at 14.

7.

There is no evidence of actual, subjective, prosecutorial vindictiveness in this case. A presumption of prosecutorial vindictiveness, however, does arise, under *Blackledge* and the cases following it, from the fact that, after successfully seeking a mistrial over the government's objection, the government obtained the superseding indictment adding DKP as a defendant, thus exposing King to penalties greater than those to which he was exposed at the first trial. For reasons explained above, the government's application for a mistrial after a mistrial had already been granted, does not remove the presumption. The presumption has not been rebutted, for reasons set forth above.

Accordingly, the motion of King and DKP to dismiss the superseding indictment as to DKP is granted, and the superseding indictment is dismissed as to DKP.

8.

King and DKP argue that the superseding indictment should be dismissed as to both of them because the determination to prosecute them violates the guidelines contained in the U.S. Department of Justice United States Attorneys' Manual (the "Manual"). King, and now his wholly owned company, DKP, are being prosecuted, they say, because of the "identity of the offender." (Manual § 9-27.230(B) (2).) The Court does not pass on that issue because the Manual, § 1-1.100, specifically states that it "is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal." For that reason, the motion is denied.

9.

Defendants' motions for a severance of the trials of King and DKP and to preclude the introduction of King's testi-

mony, given at the first trial, against DKP are denied as moot. Decision is reserved on the motion to dismiss the aiding and abetting charges.

SO ORDERED.

Dated: New York, New York
August 22, 1997

/s/ Lawrence M. McKenna
LAWRENCE M. McKENNA
U.S.D.J.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 18th day of November, one thousand nine hundred and ninety-seven.

Dkt No: 97-1495

United States of America,

Appellant,

v.

Don King and Don King Productions, Inc.,

Defendants-Appellees.

[stamp—FILED NOV 18 1997; GEORGE LANGE III, CLERK; UNITED STATES COURT OF APPEALS, SECOND CIRCUIT]

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellant,

> Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular

active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: /s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney

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